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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-911

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Respondents.

No. 78-1036

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, ET AL.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

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BRIEF OF ASARCO INCORPORATED AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

ASARCO is a leading smelter of non-ferrous metals. As such, it is directly affected by many occupational safety and health regulations promulgated by the Sec-

retary of Labor[1] under the statute here involved, the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §§ 651-678 (hereinafter "the Act"), and has a direct interest both in the substantive provisions of such regulations and in the standards and procedures governing their adoption. ASARCO is a party to two major proceedings for the review of OSHA regulations: No. 79-1048 and consolidated cases in the United States Court of Appeals for the District of Columbia Circuit, for review of OSHA's inorganic lead standard; and No. 78-1959 and consolidated cases in the United States Court of Appeals for the Ninth Circuit, for review of OSHA's inorganic arsenic standard. Those proceedings raise sundry issues not involved in the case at bar. ASARCO believes that the petitioners have stated the issues herein too broadly and that they seek to have the Court deal with questions not necessary to the decision and to prejudge questions better dealt with on the full records of other cases, including ASARCO's pending proceedings. ASARCO accordingly files this brief *amicus curiae* both in its own interest and in the hope that doing so will further "the public interest in the administration of justice." *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946). Written consents from all parties to the filing of this brief are on file with the Clerk.

[1] We refer interchangeably herein to "the Secretary" and to "OSHA".

ARGUMENT

I. The Essential Element Of The Holding Below Is That There Is No Evidence That The Burdensome And Costly Regulation Here Involved Is Directed At A Real Hazard.

A. The facts.

The operative facts herein are few and simple.

Benzene can be toxic in sufficiently high concentrations. In high enough concentrations it can cause leukemia. Previous OSHA regulations impose a permissible exposure limit ("PEL") for benzene of 10 parts per million ("ppm"). The regulations under review would reduce this to 1 ppm. It is undisputed that there is no evidence that there is any *real,* as opposed to conjectural, difference in risk between exposure of 10 ppm and exposure of 1 ppm.

That there may be some nominal or theoretical difference in risk between the two levels of exposure can be deduced as a matter of abstract logic from the facts that (a), as the Secretary found, it is a matter of scientific dispute whether there is a safe level of exposure to any carcinogen, and (b) it is generally recognized that exposure to carcinogens at low levels is safer than exposure at higher levels. But there is no evidence at all that this putative difference, this logical construct, is other than nominal or hypothetical; no evidence that it is non-trivial, meaningful, substantial, measurable, perceptible or detectable by any method or instrumentality.[2] (Even at 10 ppm, the highest maxi-

[2] "The lack of substantial evidence of discernible benefits is highlighted when one considers that OSHA is unable to point to any empirical evidence documenting a leukemia risk at 10 ppm even though that has been the permissible exposure limit since 1971." 581 F.2d at 503, Pet. App. 18a.

mum estimate in the record was that exposure to benzene at that level entails only an infinitesimal risk of cancer; the same risk as eating two peanut butter sandwiches a week, flying round trip across the country once a month, or drinking a little more than one cup of chlorinated tap water a day. App. 174.)

There is thus no evidence that reducing the PEL from 10 ppm to 1 ppm would cure any real-world evil, or confer any real-world benefit on anyone. Nevertheless, OSHA ordered the reduction implemented—at a cost to affected private parties of some half a billion dollars at least. The Government does not dispute this lack of evidence. The Government's position rather is that OSHA has the authority to impose these regulations nevertheless.

B. The holding below.

The court below set the regulations aside. It held that the Act obliges OSHA to enact only standards that are reasonably necessary or appropriate to provide safe or healthful workplaces. 581 F.2d at 502, Pet. App. 15a. Before it regulates, said the court below, OSHA must show that a hazard exists and that its regulation will reduce the risk from the hazard. 581 F.2d at 502-503, Pet. App. 17a. In short, said the court, OSHA must have some factual basis for an estimate of expected benefits before it can determine that a one-half-billion-dollar standard is reasonably necessary. *Ibid.*

The Government distorts this holding beyond recognition. The Government would have it believed that the court below held that "the Secretary must ascertain the number of lives (and other health benefits) that the standard will save and determine whether

their value bears a 'reasonable relationship' to the cost of implementing the standard." Brief for the Federal Parties (hereinafter "Government Brief"), p. 32. It would have it believed that the court below required a "kind of tradeoff," *id.* at 71, "weighing the value of life and health against the cost of their preservation," *id.* at 55; that it required OSHA to "set the level of exposure [to toxic substances] at the point where the additional lives saved by further reduction are not worth the additional cost to save them," *id.* at 22. This is a grotesque mischaracterization. The opinion below will be searched in vain for any reference whatever to ascertainment of the number or value of lives saved, to any weighing of the value of life and health, or indeed to any "tradeoff" of any kind.

Indeed, the court below was explicit that "the agency *does not* have to conduct an elaborate cost-benefit analysis." 581 F.2d at 503, Pet. App. 17a (emphasis added); that it required no more than "*rough but educated* estimates of the extent of benefits expected." 581 F.2d at 504, Pet. App. 21a (emphasis added). Read in context, the references of the court below to a requirement that OSHA "assess the expected benefits in light of the burdens to be imposed," 581 F.2d at 503, Pet. App. 17a, that it "determine whether the benefits expected bear a reasonable relationship to the costs imposed," *ibid.*, that it "estimate the extent of the expected benefits and costs," *ibid.*, that it "estimate the extent of expected benefits in order to determine whether those benefits bear a reasonable relationship to the standard's demonstrably high costs," 581 F.2d at 504, Pet. App. 19a, that it "provide substantial evidence that the benefits to be achieved . . . bear a reasonable relationship to the costs imposed," *ibid.*, were

all merely variations on the basic theme that the Secretary cannot impose costly burdens that bring no demonstrable benefit and cure no demonstrable ill. That was the key consideration for the court below. "Before it regulates," it said, "the agency must show that a hazard exists and that its regulations will reduce the risk from the hazard. . . ." 581 F.2d at 502-03, Pet. App. 16a. It spoke in terms of requiring some showing that the regulations would do some real good; that actual, tangible, real, definable benefits—the court used terms like "discernible," "measurable," and "appreciable," 581 F.2d at 503, Pet. App. 18a—would result from the regulation; a showing based on substantial evidence, not on the "assumption that the [regulation] is likely to result in benefits" or a "deduction" that the regulation will "result in some benefit" which, if it existed at all, might be trivial, infinitesimal, *de minimis* and below the threshold of perceptibility, measurability, or significance. 581 F.2d at 503-504, Pet. App. 18a-19a.

II. The Construction Of The Act For Which The Government Contends Would Raise Significant Constitutional Questions.

It is against this background that the references by the court below to the weighing of costs against benefits must be read. And it is against this background too that that Government's position here must be viewed. The Government's argument is not merely that the Secretary need not conduct a cost-benefit analysis. The Government's argument is that the statute authorizes the Secretary to impose burdensome and costly regulations *without any showing that they address any real evil or confer any real benefit.* Thus viewed in its true light, the Government's argument does not make a

case for elaborate exegesis of statutory language, or for minute sifting of legislative history. It makes a due process case.

It is perhaps singular that a substantive due process issue in the field of business regulation should be raised before this Court more than forty years after *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379 (1937), and *United States* v. *Carolene Products Co.,* 304 U.S. 144 (1938), and more than sixteen years after *Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). But it is at least equally surprising that government officials could take the position in the year 1979 that they can impose burdensome and enormously costly regulation on *no* showing of *any* rational need or justification whatever.[3] The issue the Government's construction of the Act would tender is not, be it noted, whether the challenged regulation is "unwise, imprudent, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488 (1955). The issue rather is whether the Government can burden private parties with enormously costly regulations on no showing of need; whether "there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law," whether protected rights can "be infringed by a law having no purpose or utility whatsoever." *Moore* v. *East Cleveland,* 431 U.S. 494, 548 (1977) (White, J., dissenting).

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[3] Even the Government admits, fleetingly, that "there must be substantial evidence for concluding that a lower exposure level will be beneficial", adding that "here there was such evidence, as the court of appeals acknowledged." Government Brief, pp. 70-71. This is a fast glide over some very thin ice. The "evidence" cited by the Government was, of course, nothing more than the "deduction" or logical construct referred to at p. 3 *supra.*

We submit that, interpreted as the Government would have it interpreted, the Act could not survive constitutional scrutiny. Even under the generous modern approach to substantive due process in the context of economic regulation, it remains true that a burdensome and expensive regulation that has no rational basis denies due process. "[R]egulation which is *reasonable in relation to its subject* and is adopted in the interests of the community is due process." *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 391 (1937) (emphasis added). No one can say that the half-billion-dollar regulation in this case is "reasonable in relation to its subject," for no one knows what that relationship is—if any. "If the laws passed are seen to have a *reasonable relationship* to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. . . ." *Nebbia* v. *New York,* 291 U.S. 502, 525 (1934) (emphasis added). Preventing occupational illness is a proper legislative purpose; but no one can say that the half-billion-dollar regulation before the Court has a reasonable relationship to that purpose, for no one can say whether it has any such relationship at all. It may be "enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," *Williamson* v. *Lee Optical,* 348 U.S. 483, 488 (1955); but here no one can say that *in fact* there is "an evil at hand" which the measure would rationally correct. It strains language to the breaking point to say that regulation directed against an evil whose existence is only a logical construct and whose magnitude is at most nominal has any rational basis. Yet that is the import of the statutory construction for which the Government here contends.

III. The Statute Can And Should Be So Construed As To Avoid The Constitutional Question Posed By The Government's Construction.

The Court need not and should not decide this constitutional issue here. It is black-letter law that a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts. *Lynch* v. *Overholser,* 369 U.S. 705, 211 (1962); *United States* v. *Witkovitch,* 353 U.S. 194, 201-202 (1957); *Ashwander* v. *TVA,* 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring). "[I]f a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932). Here, such a construction is not only "fairly possible"; it is the only one that makes good sense on the face of the statutory language itself. It is the construction made by the court below.

In this brief we will not deal with the matter of statutory construction in any detail. It is exhaustively addressed in the brief of respondent American Petroleum Institute, and we will simply summarize its chief elements. First, the *only* delegation of rulemaking authority here involved is that contained in section 6(b) of the Act, 29 U.S.C. § 655(b). Second, that section authorizes the Secretary by rule to promulgate "occupational safety or health standard[s]"; and section 3(8) of the Act, 29 U.S.C. § 652(8), defines the standards so authorized as those which are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Therefore, OSHA has been authorized by Congress only to promulgate rules which are "reasonably necessary or ap-

propriate" to provide safe or healthful employment. And it is inherent in the very meaning of the words that a regulation cannot be said to be "reasonably" necessary or appropriate to provide safe or healthful employment without a showing that the regulation will in fact make a "reasonable" difference in safety or health conditions; that employment *with* the regulation is, to some "reasonable" degree, safer or healthier than employment *without* it. Any other interpretation strains not only language but credulity. It is simply implausible to believe, absent absolutely clear and unambiguous language, that Congress would have sought to confer on any official the power to issue Draconian rules—and fiercely expensive ones—with no showing whatever that they would do anyone any perceptible good. Certainly, since this construction is not merely "fairly possible" but is compelled by logic and grammar alike, and avoids a not insubstantial constitutional question, it is to be preferred over the tortured construction offered by the Government.

IV. In This Case It Is Unnecessary To Address The Additional Matters Sought To Be Injected By The Government.

A. It is unnecessary to address in this case the nature and extent of any cost-benefit or cost-effectiveness analysis required by the Act.

In short, construed so as to avoid constitutional questions the statute requires that any regulations issued under it be directed at a real, not a nominal, hazard; and here no such hazard has been shown. We submit that this disposes of the case. It is not here necessary to go further and examine the extent to which the statute requires OSHA to balance the cost of regulation against actual tangible benefits, nor the extent to

which the statute requires OSHA to weigh the comparative costs of different methods of achieving a given level of protection. Nor is it necessary to review here what the court below said with respect to the weighing of costs against benefits.

This is not to say that the statute does not impose such requirements. It does. Indeed, the constitutional concept of reasonable relationship to a legitimate purpose itself embraces such considerations, for there must be a point at which the mandating of megaton-yield weaponry at private expense to kill hypothetical gnats would spill over into irrationality.[4] Indeed, only last Term, in upholding against a due process challenge the figure set by Congress as the limit of liability for nuclear power operators in the Price-Anderson Act, 71 Stat. 576, 42 U.S.C. § 2210, this Court applied just such a means-ends test by appraising the figure fixed by Congress against such factors as the need to encourage the industry and the likelihood that any losses greater than the limit would be suffered. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 84-87 (1978). See also *California Bankers Association* v. *Shultz*, 416 U.S. 21, 50 (1974). We believe in any case that the Act itself requires such an appraisal, both in its requirement of "reasonable necessity" and in its requirement of "feasibility." This matter, again, is dealt with comprehensively in the brief of respondent American Petroleum Institute. But we submit that consideration of this issue by this Court should await a case in which the issue is fairly presented by an OSHA regulation directed at some real, demonstrated,

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[4] TVA *v.* Hill, 437 U.S. 153 (1978), cited at Government Brief, p. 41, deals with Congress's setting of the Government's own priorities, and has nothing to do with due process to private parties.

tangible risk against which the costs of the regulation might be balanced. That is not this case.

B. It is unnecessary in this case to go beyond the basic issue in other respects suggested by the Government.

This is the first case involving the substantive bounds of OSHA's rulemaking authority to be heard by the Court.[5] It is understandable therefore that the Government would seek to have the Court's opinion herein grant it a sweeping charter, and endorse its practices and policies as broadly as possible. The Government's brief accordingly touches on a number of extraneous issues, and characterizes some OSHA policies in a way with which others would not agree. We urge the Court to reject the Government's efforts to broaden the issues unnecessarily. We urge the Court to make clear in its opinion that it is dealing with OSHA's authority to regulate toxic substances only in the context of the record before it. Otherwise, cases may be prejudiced as to which the scientific evidence is quite different—such as the proceedings now pending for review of OSHA's lead and arsenic standards, to which ASARCO is a party.

We note first that this case deals with benzene, a relatively recent creation of man. The record as to such a substance has little or no necessary bearing on such quite different substances as arsenic or lead, which are naturally occurring elements to which man-

[5] Marshall *v.* Barlow's, Inc., 436 U.S. 307 (1978), involved a procedural matter, holding OSHA's practice of warrantless searches of private premises to be unconstitutional. Atlas Roofing Co. *v.* OSHA, 430 U.S. 442 (1977), also involved a procedural issue, the right to jury trial with respect to civil penalties.

kind has been exposed throughout its evolution and to which it has developed a degree of natural tolerance, so that low exposures can be borne without ill effect. Nor do OSHA's abstract deductions about carcinogens and the supposed absence of a safe level of exposure to them have any application to substances such as lead which are not even claimed to be carcinogens. We respectfully urge the Court to take care that nothing be said in its opinion herein that would prejudice the issues as to lead, arsenic, and other substances having little or nothing in common with benzene.

We note secondly there is no need here to consider whether the substantial evidence review mandated by section 6(f) of the Act, 29 U.S.C. § 655(f), for *all* the Secretary's "determinations" is nevertheless inapplicable to determinations that are clearly of a "policy" nature. See Government Brief, p. 44 note 37, at p. 45. Whether the benzene standard would produce real benefits was clearly a question that was subject to evidentiary development. The broader matter of the standard of review applicable under this statute to true policy determinations is a vexed question, about which distinguished judges of the courts of appeal have "ruminated" at length. *E.g., IUD* v. *Hodgson,* 499 F.2d 467, 472-76 (D.C. Cir. 1974) (McGowan, J.); *Associated Industries* v. *Department of Labor,* 487 F.2d 342, 347-50 (2d Cir. 1973) (Friendly, J.). It involves peculiar statutory language reflecting a compromise between House and Senate, see *Associated Industries, supra,* at 347-49. It is not a simple issue, it should not be passed upon without full briefing and

argument, it is not here presented, and it need not here be addressed.[6]

We note finally that the history of OSHA regulation has not been the story of reasoned decision-making, taking costs and benefits into rational account, that the Government brief implies; and that OSHA's policies, stated or applied, have been confused and contradictory. As the brief of respondent American Petroleum Institute points out, in annual reports and speeches and testimony by the Secretary of Labor and the cognizant Assistant Secretary, OSHA has repeatedly claimed that it was making efforts to quantify the benefits achieved by its regulation, and that it regularly performs incremental cost-benefit analyses which are a key factor considered before new regulations are issued; yet in actual published standards it has freely admitted the absence of such studies. See, *e.g.,* the Preamble to the Inorganic Lead Standard, 43 Fed. Reg. at 54427 (November 21, 1978). Again, the Government implies that OSHA has used a "risk-assessment" technique to determine "safe" levels of exposure to non-carcinogens, and has limited PEL's to levels so determined in such cases. Government Brief, p. 68 note 47. We are aware of no example of this. Rather, OSHA almost invariably concludes that no safe level exists, and mandates the lowest level achievable. Even in the inorganic lead standard, OSHA set

[6] The constitutional issue discussed in Part II of this brief, *supra,* would of course not be affected by the resolution of this question, since that issue goes to the question whether the Secretary's action bears a reasonable relationship to a legislative purpose on any interpretation of the record. Nor in any event do the cases addressing this issue support the wide-open and virtually untrammeled authority for which the Government contends here. Neither do the other cases cited at Government Brief 44-45.

the PEL drastically lower than the level at which adverse health consequences were shown to exist. 43 Fed. Reg. at 52964 (November 14, 1978) and 54427 (November 21, 1978). Again, though the Government's brief pays lip-service to the concept of "cost-effectiveness" (the consideration, that is, of the comparative cost of alternative methods of achieving a given PEL), concedes that it is mandated by Executive Order No. 12044, 43 Fed. Reg. 12661 (March 24, 1978), Government Brief, p. 67 note 55, and implies that OSHA uses it "in selecting the method by which employers must achieve the lowest feasible level of exposure," Government Brief, p. 71, we are in fact aware of no instance in which OSHA has allowed a PEL to be achieved by the use of relatively inexpensive personal protective devices rather than by costly engineering controls and work practices unless the latter were wholly unfeasible.[7]

None of these matters is before the Court in this case. Indeed, the Government concedes that issues with respect to cost-effectiveness determinations are "quite different" from those presented here. Government Brief, p. 67 note 55. These and the other issues mentioned above, however, are or may be presented in the proceedings for review of the inorganic lead and in-

[7] Thus, the inorganic lead standard, which does not even deal with a "life-threatening" carcinogen, *cf.* Government Brief, p. 42 note 35, forbids the use of personal protective devices to achieve the PEL even though recognizing that in some circumstances it can be achieved by no other means. *Compare, e.g.,* 43 Fed. Reg. 54482 (November 21, 1978) (maintenance operations) *with* 43 Fed. Reg. 53008 (November 14, 1978) (methods of compliance). *Cf.* the inorganic arsenic standard, in which OSHA flatly refused to consider the cost-effectiveness of personal protective devices against that of engineering controls. 43 Fed. Reg. 19607 (May 5, 1978).

organic arsenic standards now pending in the courts of appeal for the District of Columbia and Ninth Circuits. We, therefore, urge the Court expressly to confirm in its opinion herein that such issues are not before it in this case.

In short, the world of OSHA regulation is not the rational and orderly one that the Government's brief implies. Lurking in this tangled thicket are many issues that will come before the courts in due course on their own records, issues whose consideration should not be prejudged by the sweeping ruling sought by the Government here.

CONCLUSION

To interpret the Act as the Government would have the Court do—as conferring on an official the untrammeled and unreviewable authority to impose on private parties burdens and costs of staggering magnitude so as to secure hypothetical benefits which, if they exist at all, are not shown to be more than merely nominal in nature or infinitesimal in amount (if that)—would raise serious due process questions. Such questions can and should be avoided by a simple and straightforward construction of the Act as requiring substantial evidence that an occupational safety and health standard will result in real benefits. No further issue need or should be decided on this record.

Respectfully submitted,

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